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No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JOSEPH L. DEAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Military Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A

Whether petitioner's trial was rendered fundamentally unfair when the trial judge permitted a child services coordinator and a county staff psychologist to testify about statements made to them by the victim, where the testimony was offered by individuals who either failed to qualify as medical personnel or where the victim did not perceive that the information was necessary for medical treatment or diagnosis, pursuant to a hearsay exception for statements made for purposes of medical treatment or diagnosis, where the controlling Military Rule of Evidence is identical with and adopted from the corresponding Federal Rule of Evidence.

B

In the alternative, whether the United States Court of Military Appeals erred to the substantial prejudice of petitioner when it held, contrary to the interpretation by the other Federal Circuit Courts of Appeal, that the hearsay testimony by individuals who either failed to qualify as medical personnel or where the victim did not perceive that the information was necessary for medical treatment or diagnosis was admissible, where the controlling Military Rule of Evidence is identical with and adopted from the corresponding Federal Rule of Evidence.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Joseph L. Dean, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in this case on September 26, 1990.

OPINIONS BELOW

The United States Air Force Court of Military Review (A.F.C.M.R.) issued its initial unpublished decision, summarily affirming petitioner's conviction, on 21 April, 1989. The United States Court of Military Appeals (C.M.A.) remanded the case to A.F.C.M.R. to allow them to consider the substance of question A presented above. *United States v. Dean*, 28 M.J. 170 (C.M.A. 1989). The Court

of Military Review again affirmed petitioner's conviction, *United States v. Dean*, 28 M.J. 741 (A.F.C.M.R. 1989) (*f. rev.*). That opinion is reproduced at appendix A to this petition. The Court of Military Appeals granted review, 28 M.J. 454 (C.M.A. 1989), and affirmed in a decision reported at *United States v. Dean*, 31 M.J. 196 (C.M.A. 1990). That opinion is reproduced at appendix B to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1259(3) (Supp. 1989) and 10 U.S.C. 867(h) (Supp. 1989). The judgment of the United States Court of Military Appeals was entered on September 26, 1990.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty or property, without due process of law . . . .

STATEMENT OF THE CASE

The petitioner, an Air Force sergeant (E-4), was tried by a general court-martial on 25 through 30 January and 1-2 February 1988. Contrary to his pleas, he was convicted, by a court-martial composed of members,[1] of raping and sodomizing his daughter, Jessica, on divers occasions between 10 September 1985 and 1 May 1987 in violation of Articles 120 and 125 of the Uniform Code of Military Justice, 10 U.S.C. sec. 920 and 925, respectively. The child never testified at petitioner's trial and because Military Rules of Evidence (Mil.R.Evid.) 803(4),[2] the

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[1] The terms "members" or "court members" refer to military jurors.

[2] Mil.R.Evid. 803(4), *Statements for purposes of medical diagnosis or treatment*, "is taken from the Federal Rule [of Evidence 803(4)] verbatim." *Manual for Courts-Martial*, Appendix 22, p. A22-48, United States (1984). *Also see*, Saltzburg, Schinasi and Schlueter, *Military Rules of Evidence Manual*, Drafters' Analysis, p. 655, (2d ed. 1986).

hearsay exception under which the testimony was offered by the government, did not require the declarant be available, *see* Mil.R.Evid. 803,[3] the availability of the child to testify was never addressed. To prove the government's case, the prosecution relied upon testimony of two witnesses who offered statements made to them by the victim. The first witness was Ms. Nancy Berson, Coordinator of the Child Protection Team at the Duke University Medical Center. The second witness was Ms. Nancy Miller, a staff psychologist at the Wayne County Mental Health Center. While no confrontation issue with respect to the child was raised, defense counsel did object to the testimony as hearsay that did not fit within any exception. Specifically, defense counsel objected that the witnesses either failed to qualify as individuals cognizable under the exception or that the statements of the child were not statements made for the purpose of medical diagnosis or treatment. In a session without the members present, pursuant to Article 39, Uniform Code of Military Justice, 10 U.S.C. 839, the admissibility of these hearsay statements was litigated.

Mrs. Theresa K. Dean, Jessica's mother, testified that she initially took Jessica to the Duke Medical Center to have a weight problem evaluated. During an examination by the trial defense counsel, Mrs. Dean said that she told Jessica to cooperate with the doctors and that she thought Jessica understood she was in a hospital. Regarding whether Jessica "understood that she was there to get some type of treatment," Mrs. Dean replied, "I'm not sure about that. I don't . . . I can't give a yes or no

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[3] The rule provides: "the following are not excluded by the hearsay rule, even though the declarant is available as a witness: (4) Statements for purposes of medical diagnosis or treatment." Because the exceptions are identical and because they are both applicable to federal, albeit distinct, courts, the exceptions will be referred to collectively as rule of evidence 803(4) or simply the exception.

answer." Later, Mrs. Dean added that she told Jessica, "the lady [Ms. Berson] was going to try and help her."

When the military judge questioned Mrs. Dean, he asked if Jessica understood, "that she had problems with her weight?" Mrs. Dean replied, "I don't think she understands. She knows she's fatter than other kids and other kids make fun of her. I don't think there's real . . . that she knows she's got a weight problem, but she knows she's bigger."

Ms. Berson testified that she served as the "primary interviewer for purposes of . . . medical diagnoses of cases where we suspect child abuse or child sexual abuse." No educational background information was presented on Mrs. Berson. Instead, she testified to having interviewed "approximately 450 to 500 children . . . for purposes of medical diagnoses of child sexual abuse." *United States v. Dean*, 31 M.J. 196, 197 (C.M.A. 1990). Ms. Berson testified that she had met Jessica at the Duke Medical Center Hospital and told her "what my role would be during her admission at the hospital, [Berson told Jessica] that I was a lady who talked with kids in the hospital when we were concerned that things might be bothering them or worrying them." *Id.* at 198.

Ms. Miller talked with Jessica at Miller's office at the Wayne County (N.C.) Mental Health Center, where Miller served as a psychological associate. Ms. Miller explained the difference between a psychological associate and a psychologist was that the former had a Master of Arts degree in psychology, while the latter held a PhD in psychology. After initially interviewing Jessica on three occasions in September 1987, Miller became Jessica's "therapist." In that capacity "she had attempted to 'prepare the child for emotional trauma' of testifying in court. This included role playing in 'a mock courtroom setting'." *Id.* at 198-99.

The findings of fact, regarding the objection, were expressly set out by the military judge and are reprinted in

the opinion of the Court of Military Appeals. 31 M.J. at 201-02. In essence, the judge's findings were that Jessica "perceiv[ed] that the situation [was] one that [would] promote her well being and thus would have an incentive to be truthful. . . . She need not know the exact medical purposes for which the information is being requested nor [did] she need to know with any medical precision that something [was] specially [sic] wrong." *Id.* at 201. The judge further opined that "persons in the medical capacity, such as Mr. Berson and Ms. Miller, fit within the rule of persons covered by this rule." *Id.*

The Court of Military Appeals held that the military judge correctly overruled the defense objection and properly permitted Ms. Miller and Ms. Benson to testify before the members regarding the statements made by Jessica. The Court concluded that because the statements made to Ms. Berson were made in a hospital, and Jessica had previously been in the hospital for thyroid surgery and because Jessica was aware that she had a weight problem, the requirement that "Jessica expected to benefit from giving truthful answers" was satisfied. 31 M.J. at 204.

With respect to the statements made to the psychological associate, Ms. Miller, the court opined that while admissible, it was—"although narrowly—within the rationale of Mil.R.Evid. 803(4)." *Id.* The court stated that because the interviews with Ms. Miller were not in a hospital context it was less clear that Jessica perceived the benefit from being truthful in her answers. *Id.*

REASONS FOR GRANTING THE WRIT

The petitioner's trial was rendered fundamentally unfair when the military judge overruled the defense objection to the hearsay by Miller and Berson. The military appellate courts' affirmation of that decision necessitates review by this Court to correct a conflict between the Court of Military Appeals and the Federal Circuit Courts of Appeal. While the questions are presented in the alternative, in fact they are inextricably linked and will be addressed simultaneously.

Military Rule of Evidence 803(4) and Federal Rule of Evidence 803(4) both provide a hearsay exception for statements made for purposes of medical diagnosis or treatment and are admissible even though the declarant is available as a witness. There are two prongs to this exception before such a hearsay statement is admissible. The leading federal cases regarding this hearsay exception are *United States v. Renville*, 779 F.2d 430 (8th Cir. 1985) and *United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981). *See Morgan v. Foretich*, 846 F.2d. 941 (4th Cir. 1988) (Powell, Associate Justice (retired), sitting by designation, concurring in part and dissenting in part).

In both *Renville* and *Iron Shell* the court set forth the rationale for permitting the hearsay exception before the bar.[4] "It focuses upon the patient and relies upon the patient's strong motive to tell the truth because diagnosis or treatment will depend in part upon what the patient says. It is thought that the declarant's motive guarantees trustworthiness sufficiently to allow an exception to the hearsay rule." *Iron Shell*, at 83-84 (citing *Meaney v. United States*, 112 F.2d 538 (2d Cir. 1940); *Renville*, at 436. In *Renville*, the court recognized an expansion of the

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[4] It must be noted that in *Renville* and *Iron Shell* the hearsay exception involved the testimony of doctors, not team coordinators or psychological associates as presented in the instant case.

traditional common law hearsay exception, by ruling that statements regarding the identity of a child abuser are reasonably pertinent to diagnosis or treatment, where the victim is an occupant of the abuser's immediate household. *Id.* at 436. The complete ruling, however, permitted such testimony only where the statement was made to a physician during an examination.

Subsequent to *Renville*, the exception has been further expanded to permit the exception for phychologists. *See, United States v. Spotted War Bonnet*, 882 F.2d 1360 (8th Cir. 1989); and, *Nelson v. Farrey*, 874 F.2d 1222 (7th Cir. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 835, 107 L.Ed.2d 831 (1990). Furthermore, the exception has been applied to physicians who see the child abuse victim for purposes of making a diagnosis, as well as treatment. *United States v. Shaw*, 824 F.2d 601 (8th Cir. 1987), *cert. denied*, —— U.S. ——, 108 S.Ct. 1033, 98 L.Ed.2d 997 (1988).

While the hearsay exception permitted under Rule of Evidence 803(4) has been applied repeatedly since *Iron Shell*, there has been a consistency in that application: it has been permitted for the testimony of physicians or their PhD counterparts in psychology. *See Gregory v. North Carolina*, 900 F.2d 705 (4th Cir. 1990); *United States v. Provost*, 875 F.2d 172 (8th Cir. 1989). At the same time, no civilian federal court has ever permitted, let alone affirmed, testimony under this exception where the individual testifying was not either a doctor or PhD psychologist. *See for example, United States v. Cree*, 778 F.2d 474 (8th Cir. 1985) (Social worker permitted to testify regarding statements made to her by victim, but testimony admitted pursuant to Federal Rule of Evidence 803(24) [5]; *United States v. Spotted War Bonnett, supra.* (Clinical psychologist permitted to testify to statements

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[5] Military Rule of Evidence 803(24) is taken without change from the federal rule.

made by child victim pursuant to Rule of Evidence exception 803(4), but child protection worker permitted to testify under 803(24)); *United States v. Shaw, supra.* (Physician permitted to testify under 803(4), but social worker's testimony admissible under 803(24)).[6] Despite this consistency amongst the Federal Circuits, only military courts have permitted persons not qualified as either physicians or PhD psychologists to testify under the exception provided by 803(4).

While the Court of Military Appeals cited *United States v. Deland*, 22 M.J. 70 (C.M.A.), *cert. denied*, 479 U.S. 856, 107 S.Ct. 196, 93 L.Ed.2d 128 (1986), as authority for permitting the hearsay testimony of both Ms. Miller and Ms. Berson, the qualification of the individual testifying in *Deland* is clearly distinguishable from those of the witnesses in the instant case. In *Deland*, the hearsay testimony was offered by a child psychiatrist. *Id.* at 72. The Court of Military Appeals also cited *United States v. LeMere*, 22 M.J. 61 (C.M.A. 1986), as further authority for the proposition that individuals other than doctors or psychologists were permitted to testify regarding statements made to them by the child victim. The problem with *LeMere* as authority in the instant case is that in *LeMere* the testimony was never offered under the exception provided by 803(4). The final authority cited by the court was *United States v. Arnold*, 25 M.J. 129 (C.M.A. 1987), *cert. denied*, 484 U.S. 1060, 108 S.Ct. 1015, 98 L.Ed.2d 980 (1988). Again, the hearsay exception examined by the court was not 803(4), but rather were the "excited utterance" and "residual" hearsay exceptions provided by Mil.R.Evid. 803(2) and 803(24), re-

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[6] The guidance regarding 803(4), provided by *Renville*, has also impacted several states. *See for example, State v. Robinson*, 153 Ariz. 191, 200, 735 P.2d 801, 810 (1987); *Stallnacker v. State*, 19 Ark. App. 9, 11-12, 715 S.W.2d 883, 884-85 (1986); and, *State v. Aguallo* 31 N.C. 590, 596-97, 350 S.E. 2d 76, 80 (1986).

spectively.[7] The Air Force Court of Military Review, however, addressed the issue in question more specifically, and relied upon the Court of Military Appeals case of *United States v. Williamson*, 26 M.J. 115 (C.M.A. 1988).

In *Williamson*, the Court of Military Appeals, while setting aside the conviction, opined that testimony of a social worker who had interviewed the victim "may well qualify for admission" under Mil.R.Evid. 803(4), "medical history." *Id.* at 118. In support of this dictum, the court cited *Deland, supra*; *United States v. White*, 25 M.J. 50 (C.M.A. 1987); and, *United States v. Welch*, 25 M.J. 23 (C.M.A. 1987). The witness providing the hearsay testimony in *White*, like the witnesses in *Spotted War Bonnet* and *Nelson v. Farrey*, both *supra*, was a PhD psychologist. Thus, *White* provides no authority for permitting the witnesses in the case *sub judice* to qualify for the "medical history" exception. Instead, it appears to be dicta in the Court of Military Appeals decision in *Welch*, that is the source of authority for permitting individuals other than physicians or PhD psychologists to qualify under the exception.

In *Welch*, the court was presented with the testimony of a PhD psychologist and a psychotherapist, who was a member of the PhD psychologist's staff. The defense counsel objected to the hearsay testimony of both of these individuals because they were not "medical doctors." The holding of the court was that "the victim's statements to a psychologist were shown to fall within the medical-diagnosis-and-treatment exception to the hearsay rule established by Mil.R.Evid. 803(4) . . ." *Id.* 25 M.J. at 24. Thus, rather than addressing the PhD psychologist and the psychotherapist individually, the court addressed them as a team. In holding that Mil.R.Evid. 803(4) permitted testimony by a PhD psychologist, the court cited

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[7] These exceptions are taken verbatim from the exceptions provided by Federal Rules of Evidence 803(2) and 803(24).

the Advisory Committee's Notes to Fed.R.Evid. 803(4) and noted that they were in accord with the Drafter's Analysis of Mil.R.Evid. 803(4). *Id.* at 25. Both the Committee's Notes and the Drafter's Analysis provide "the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included." *Id.*

In the instant case, neither of the witnesses met the qualifications necessary to permit them to testify regarding the statements made by the victim. Notwithstanding this fact, the military judge overruled the objection and the military appellate courts affirmed that ruling. The significance of this ruling is that it renders the hearsay testimony of the non-physician or non-PhD psychologist, to have the same degree of reliability attributed to "firmly rooted hearsay exceptions." *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). A result never envisioned under the common law hearsay exception.

In *Roberts*, the Court opined that the reliability necessary to make extrajudicial statements admissible "can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.* 488 U.S. at 66. In *United States v. Bourjaily*, 483 U.S. ——, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987), the Court, citing *United States v. Dutton*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), opined that a showing of "reliability [was] required where the evidentiary rule deviates from common-law approach." *Bourjaily*, 1107 S.Ct. at 2783. In *Coy v. Iowa*, —— U.S. ——, 108 S.Ct. 2798, 101 L.Ed. 2d 857 (1988), this Court opined that an exception to the Confrontation Clause, and hence the hearsay rule, created by a 1985 Iowa statute "could hardly be viewed as firmly rooted." 108 S.Ct. at 101 L.Ed.2d at 867. Thus, given the difference between the common law hearsay exception, *see*, Mosteller, *Child Sexual Abuse and Statements*

for the Purpose of Medical Diagnosis or Treatment, 67 N.C.L. Rev. 257 (1989), and the application of that exception in military courts, added to the relatively recent origin of the application to non-physicians or non-PhD psychologists, there can be no question that a showing of reliability was required before accepting the testimony under Rule of Evidence 803(4).

In effect, this requirement for a showing of reliability transforms the admissibility of the hearsay testimony from the "medical history exception," 803(4) to the "residual" hearsay exception under 803(24). This transfer is consistent with the treatment accorded non-physician and non-PhD psychologists by the Federal Circuit Courts of Appeals. *See for example, United States v. Cree*, and *Gregory v. North Carolina*, both *supra*.

In *Idaho v. Wright*, 497 U.S. ——, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), this Court established that in addressing the "particularized guarantees of trustworthiness" necessary to render hearsay admissible under the residual hearsay exception, the only circumstances to be considered "are those that existed at the time the statement was made and do not include those that may be added by using hindsight." *Id.*, 110 S.Ct. at 3149 (citing *Huff v. White Motor Corp.*, 1609 F.2d 286, 292 (7th Cir. 1979). "In other words, if the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the hearsay rule does not bar the admission of the statement at trial." 110 S.Ct. at 3149.

As set forth earlier, the factors that make the "medical history" hearsay exception reliable, are the self-interest of the patient and the purpose for which the statements are to be used. The self interest involved is the "expectation of receiving *medical benefit* from the diagnosis or treatment that is being sought." *Williamson*, 26 M.J. at 118 (emphasis added). Furthermore, the expectation must be measured by "what the child rather than her mother had in mind." *Deland*, 22 M.J. at 73.

An examination of the circumstances surrounding Jessica's statements to Ms. Berson and Ms. Miller clearly reveal that the five year old child had no expectation of receiving any medical benefit from making the statements. What the patient had in mind may be inferred from the information available when she, Jessica, began the sessions. First, Jessica went to the doctor for a weight problem. Second, Jessica Dean did not *seek* medical attention for any type of sexual abuse, instead, she was referred for such treatment. Third, Ms. Berson "explained to her [Jessica] that she [Ms. Berson] was not a doctor or a nurse." Ms. Berson also informed Jessica that she [Ms. Berson] "was a lady who would come by and talk with her about things that were bothering her or worrying her." Ms. Miller, similarly, told Jessica that Ms. Miller's job was "to work with special children and to help them if they needed help or if anything was making them sad or bothering them." Thus, the facts revealed that not only did the patient not seek or even feel the need for treatment, but her mother did not seek the treatment for her.

Additionally, the young child was presented with very little, if any, information that either Ms. Berson or Ms. Miller were offering medical care or help. Ms. Miller interviewed Jessica, not in a hospital or doctor's office, but rather in a county office. Finally, with respect to Ms. Berson, Jessica was expressly told that she was not talking with the type of person a young child associated with medical help, i.e., a doctor or nurse. In *Morgan v. Foretich*, *supra*, Justice Powell, citing *Renville*, *supra*, found it significant, to a child's appreciation of the medical benefit to be derived from being honest, that the doctor who interviewed the child never:

> "explained [to the child] that his questions and relationship with her arose, at least in part, from a desire to treat her. Thus, an important element contributing to the reliability of 'physician treatment' statements that was explicity found to be present in both *Renville* and *Iron Shell*, i.e. the strong motive

> for the declarant to tell the truth in order to promote treatment [had] not been established. . . ."

846 F.2d at 952.

In the case *sub judice*, the judge's finding that Jessica believed that answering the questions from Ms. Miller and Ms. Berson, would promote her general "well being" does not rise to the level necessary to guarantee the trustworthiness of the extrajudicial statement whose basis lies in the self interest inherent in staying alive. The Air Force Court of Military Review applied a relaxed standard of evidence to arrive at the conclusion that the child was aware of the treatment purpose for eliciting the statements. In particular the court noted the language "there may be some relaxing of the quantum of proof in those situations where a child is being treated[.]" *Dean*, 28 M.J. at 741-42 (citing *Williamson*, *supra*, 26 M.J. at 118). All of these modifications and permutations of the common law hearsay exception, upon which Rule of Evidence 803(4) is based, has undermined the inherent reliability of the statements by a child to the point where no reliability can be inferred. The relaxation of the qualifications of the individuals permitted to testify under the "medical records" exception has had a similar effect on the reliability of the statements.

As noted above, the common law "medical history" hearsay exception was limited to the statements given to medical doctors for purposes of treatment. The applicability of that limitation is especially appropriate to young children who have limited notions regarding the sources of medical treatment. The fact that Jessica was informed by Ms. Berson that she was not a doctor or a nurse severely undercuts any expectation by a child that the information is either required or being provided to facilitate medical care. *See United States v. Avila*, 27 M.J. 62 (C.M.A. 1988), cert. denied, 110 S.Ct. 562 (1989). Furthermore, the language used by both Ms. Miller and Ms. Berson that they were there to "help" was

not specific enough to provide a five year old with the notice necessary to instill the motivation to answer truthfully to insure proper medical care is rendered. In short, generalized "help" from someone who is not normally considered by a child as a source of medical treatment vitiates any motivation on the part of the child to answer with the expectation of receiving medical benefit. "Unless the extrajudicial statement by the patient was clearly made with the expectation of receiving medical benefit from the medical diagnosis or treatment that is being sought, it will be inadmissible." *Deland*, 22 M.J. at 75.

Thus, the Court of Military Appeals has further expanded the hearsay exception in a manner unprecedented in any Federal Circuit Court of Appeals. This expansion is the result of permitting unqualified, vis-a-vis the individuals identified in the rule, persons to testify under the exception in question. The expansion is also the result of the court's permitting the exception to exist where the motivation of the child is general "well being" rather than the medical benefit envisioned by the rule. Permitting such evidence to be presented to members of a court-martial rendered petitioner's trial fundamentally unfair and denied him due process of law. As this Court stated in *Dowling v. United States*, 493 U.S. ——, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990):

> Judges are not free, in defining 'due process,' to impose on law enforcement officials [their] 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function. . . .' [They] are to determine only whether the action complained of . . . violates those 'fundamental conceptions of justice . . .' which define 'the community's sense of fair play and decency. . .'

Id., 110 S.Ct. at 674, 107 L.Ed.2d at 720 (citations omitted) (citing *United States v. Lavasco*, 431 U.S. 783, 790, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977)). This same rationale must limit judges, whether civilian or military, in their application of the hearsay exceptions.

Petitioner concedes that "the military is, by necessity, a specialized society separate from civilian society. . . . [And that] [m]ilitary law is a jurisprudence which exists separate and apart from the law which governs our federal establishment." *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974). Petitioner maintains, however, that where the rationale for that separation is not applicable the distinction is inapplicable. In the instant case, the offense is not a uniquely military offense nor one impacting the military; instead, it is an intrafamilial offense. Furthermore, the frequency of courts, both military and civilian, having to hear child sexual abuse cases is clearly on the rise.[8] The hearsay exception in question is identical with and taken verbatim from its Federal Rules of Evidence counterpart. The reasoning and rationale for the exception and its application are identical in the federal civilian and military sectors. If this Court fails to grant review of this case, the members of the military, and specifically petitioner, are left to the designs of an appellate court whose loose interpretation of the rule in question, contrary to all other Federal Circuit Courts of Appeal, renders a fair trial, in matters such as the instant case, all but impossible.

CONCLUSION

The extrajudicial statements of the child-victim in this case, presented by individuals who were not qualified to present the testimony under the hearsay exception cited, rendered petitioner's trial fundamentally unfair. The result of this procedure denied petitioner due process of law. The fact that the Court of Military Appeals affirmed this practice necessitates review by this Court.

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[8] The number of cases involving child sex abuse considered during the last several years by this Court alone is evidence of the increasing frequency. *See e.g. Coy v. Iowa, supra; Maryland v. Craig*, —— U.S. ——, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990); and, *Idaho v. Wright*, —— U.S. ——, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

The fact that the affirmed procedure is without precedent in any other Federal Circuit Court of Appeals clearly manifests a conflict between the decisions of the Federal Circuit Courts of Appeal and the Court of Military Appeals. Accordingly, petitioner contends review by this Court is warranted. Therefore, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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December 1990

APPENDICES

APPENDIX A

U.S. AIR FORCE COURT OF MILITARY REVIEW

ACM 26786 (f rev)

UNITED STATES

v.

STAFF SERGEANT JOSEPH L. DEAN, FR 235-84-1816
UNITED STATES AIR FORCE

Sentence Adjudged 2 Feb. 1988

Decided 21 April 1989

Appellate Counsel for the Appellant: Colonel Richard F. O'Hair and Major Frank J. Spinner.

Appellate Counsel for the United States: Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagnoni and Major Terry M. Petrie.

Before FORAY, MICHALESKI and MURDOCK, Appellate Military Judges.

DECISION UPON FURTHER REVIEW

MURDOCK, Judge:

This case has been returned to us for consideration of an issue initially raised on appeal to the United States Court of Military Appeals. The appellant was found guilty, contrary to his pleas, of raping and committing

sodomy with his six year old daughter on diverse occasions over more than a year and a half. His approved sentence is a dishonorable discharge, seven years confinement, and reduction to airman basic. When we first reviewed this case, the appellant asserted that the evidence was insufficient to establish guilt beyond a reasonable doubt. We disagreed and issued a short form opinion on 12 October 1988. In his supplement to the petition for grant of review submitted to the Court of Military Appeals, the appellant asserts that the military judge committed prejudicial error by overruling the defense objection to the testimony of two government witnesses. We have again reviewed the record of trial and find no basis for his assertion.

Before hearsay testimony can be admitted under Mil.R.Evid. 803(4) two conditions must be met and found in the record of trial. " 'First, the statement must be made for purposes of medical diagnosis or treatment'; and second, the patient must make the statement 'with some expectation of receiving medical benefit from the medical diagnosis or treatment that is being sought.' " *United States v. Deland*, 22 M.J. 70, 75 (C.M.A.), *cert. denied*, 479 U.S. 856, 107 S.Ct. 196, 93 L.Ed.2d 128 (1986), cited in *United States v. Williamson*, 26 M.J. 115 (C.M.A.1988). In *Williamson*, Judge Cox states that "although there may be some relaxing of the quantum of proof in those situations where a child is being treated, the facts and circumstances must support a finding that both prongs of the test were met." 26 M.J. at 118.

We have considered both the *Deland* test and the permissible relaxing of the quantum of proof as they apply to this case. When the offense to which medical hearsay relates is abuse of a young child, an inflexible application of a test such as the one in *Deland* may result in unnecessary suppression of admissible evidence—not because the evidence should be be heard, but because the test is not capable of handling all the situations to which it is

applied. If a child is bleeding, it is usually easy to show that the child realized that something was wrong and that medical personnel could offer help. However, when the injuries are more emotional than physical, it is harder to expect a young child to know how to ask for help, or even to recognize the need for it.

Taking the above considerations into account, we are convinced the victim was sufficiently aware that she was in a medical facility and that her statements to the two witnesses were part of her medical diagnosis or treatment. Further, we are convinced the victim had some expectation of receiving medical benefits from her stay at the hospital and her subsequent visits to the county mental health clinic. *United States v. Williamson*, 26 M.J. 115 (C.M.A. 1988).

Ms. Berson, one of the witnesses involved in this assertion of error, testified that she met with the victim at the hospital, and that she told her she was "a lady who talked to kids in the hospital when we were concerned that things might be bothering them or worrying them." The other witness, Ms. Miller, testified that she first met the victim in her offices at the Wayne County (N.C.) Mental Health Center. The victim had been referred to the Mental Health Center by the Duke University Medical Center (where Ms. Berson is employed). Ms. Miller told the victim that her job was "to work with special children and to help them if they needed help or if anything was making them sad or bothering them. And that I was there to do that, to help her out."

The victim's mother testified that the victim had been in hospitals before, and she was sure the girl understood she was in a hospital. Further, common sense allows us to conclude that six-year olds generally have a fairly well developed idea of medical personnel and facilities. By the age of six, most children have been in doctor's offices and clinics many times for shots, physicals, and treatment for

the injuries and diseases of childhood. *See United States v. Lingle*, 27 M.J. 704, 707 (A.F.C.M.R.1988).

The military judge conducted a thorough hearing on the suppression motion and made extensive findings of fact which we have found very helpful. He found that the victim's state of mind at both interviews was that "these sessions were set up to help her." He found further that the information gathered during the interviews was "reasonably pertinent to the diagnosis or treatment" and that both witnesses "fit within the rule of persons covered by [Mil.R.Evid. 803(4)]." We concur and find no merit in the appellant's assertion of error.

We feel one more comment is necessary about the way this case has proceeded. When we first reviewed this case the appellant asserted that the evidence was insufficient to sustain his conviction. Obviously, part of our consideration of his error was a thorough evaluation of the admissibility of the evidence against him. This, of necessity, included considering whether the military judge had ruled correctly on the admissibility, by virtue of Mil.R. Evid. 803(4), of the evidence being questioned here. Even if he had not raised the issue on appeal before us, our mandate under Article 66(c), UCMJ, 10 U.S.C. § 866(c), which applies to every case we consider, requires us to review the entire record and affirm only what we find to be correct in law and fact. In other words, although the issue we decide today was not articulated in the same words when the case was before us the first time, it is not accurate to say the issue was not considered before the case reached the United States Court of Military Appeals. We agree with Chief Judge Holdaway when he says "[t]his court has always considered matters raised by appellant whether or not assigned as error. We have, on appropriate occasions, specified issues raised neither by appellant nor counsel based on our required review of the 'entire record'." *United*

States v. Mullens, 28 M.J. 574, 575, n. 2 (A.C.M.R. 1989).

We have again examined the record of trial, the issue raised by the appellant, and the government's reply thereto and have concluded that the findings and sentence are correct in law and fact and that no error prejudicial to the substantial rights of the accused was committed. Accordingly, the findings of guilty and sentence are, once again,

AFFIRMED.

Senior Judge FORAY and Judge MICHALSKI concur.

APPENDIX B

U.S. COURT OF MILITARY APPEALS

No. 61,376

ACM 26786

UNITED STATES,

Appellee,

v.

JOSEPH L. DEAN,
Staff Sergeant, U.S. Air Force,

Appellant.

Argued Dec. 13, 1989

Decided Sept. 26, 1990

For Appellant: *Major Ronald G. Morgan* (argued); *Colonel Richard F. O'Hair* (on brief); *Major Frank J. Spinner.*

For Appellee: *Captain Leonard R. Rippey* (argued); *Colonel Joe R. Lamport* and *Major Terry M. Petrie* (on brief); *Colonel Robert E. Giovagnoni.*

Opinion of the Court

EVERETT, Chief Judge:

Appellant was tried at Seymour-Johnson Air Force Base, North Carolina, by a general court-martial composed of officer members. The charges were that "on divers occasions between on or about 10 September 1985 and on or about 1 May 1987," he had raped and committed sodomy

with his daughter Jessica, in violation of Articles 120 and 125, Uniform Code of Military Justice, 10 USC §§ 920 and 925, respectively. After a hotly contested trial, the court-martial found him guilty as charged and sentenced him to a dishonorable discharge, 7 years' confinement, and reduction to the grade of E-1.

The convening authority approved the sentence; and the Court of Military Review affirmed the findings and sentence in a short-form opinion. After Dean petitioned this Court for review, we remanded the case to the Court of Military Review for consideration of admissiblity of testimony by two government witnesses about statements of the alleged victim. 28 MJ 170 (1989). Upon further review, the court below concluded that the hearsay statements in question were admissible under Mil.R.Evid. 803 (4), Manual for Courts-Martial, United States, 1984, and reaffirmed appellant's conviction and sentence. 28 MJ 741 (1989). In light of this adverse decision, appellant again sought review from this Court; and we granted this issue for review:

> WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY OVERRULING THE DEFENSE OBJECTION, BASED ON MIL.R. EVID. 803(4), TO THE TESTIMONY GIVEN BY TWO GOVERNMENT WITNESSES, NANCY L. BERSON AND NANCY R.F. MILLER.

I

At a pretrial session, defense counsel questioned admissibility of intended testimony by Ms. Nancy Berson and Ms. Nancy Miller, about statements made to them at various times by Jessica, who was then 6-years-old. To establish admissibility of these statements, the Government first called Ms. Marcia Herman-Giddens, Director of the Child Protection Team at the Duke University Medical Center in Durham, North Carolina. This witness testified that she held a Master's Degree in Public Health from

the University of North Carolina and was board-certified as a physician's assistant. She had been involved with "around a thousand" cases of child sexual abuse. She had examined hundreds of children ranging in age "from infants up to age 18."

On May 12, 1987, she had examined Jessica at the request of Dr. Nan Friedman, an endocrinologist who was seeing this patient. She performed "[a] general physical examination and then a careful genital and anal examination." Ms. Herman-Giddens "found Jessica to have an abnormal anal examination." In explaining photographs of Jessica's private areas, she testified that the girl had "virtually no hymenal tissue remaining" and had very noticeable "redness . . . around the vaginal opening" and "some clear vaginal discharge." Also, she found evidence of an old laceration at the opening of the vagina.

Ms. Nancy Berson, Coordinator of the Child Protection Team at the Duke University Medical Center, testified that she was "the primary interviewer for purposes of . . . medical diagnoses of cases where we suspect child abuse or child sexual abuse." On May 12, 1987, Marcia Herman-Giddens had stated to her that Dr. Friedman was concerned that there was a child at our clinic whose exam appeared to be abnormal, and it was felt that she needed an interview to assess her sexual abuse." After some discussion with the child's mother, Ms. Theresa Dean, and with Ms. Herman-Giddens, "it was decided that the child should be admitted for a more thorough evaluation of all of her medical problems and that the interviews would proceed during the admission."

According to Ms. Berson, since she had been at Duke, she had interviewed "approximately 450 to 500 children . . . for purposes of medical diagnoses of child sexual abuse. More specifically, in the last year, I have seen approximately 175 to 200." As a result of "a group decision," Dr. Friedman, the endocrinologist who originally

had made the referral, arranged for Jessica's admission as an inpatient at Duke. Although Ms. Berson spoke with Jessica briefly on the afternoor of May 12 to make her feel at ease, the first interview was on May 13. When she asked Jessica "if she understood why she was admitted," Ms. Berson received a negative response. Thereupon without going into detail, she "explain[ed] to Jessica what my role would be during her admission at the hospital," telling her "that I was a lady who talked with kids in the hospital when we were concerned that things might be bothering them or worrying them."

She also interviewed Jessica on May 14. At that time, when she asked the girl if she remembered the conversation of the previous afternoon, Jessica replied—"something to the effect that, 'mommy doesn't . . . said if I talk, I'll be punished,' 'I can't talk.' Then I asked her, 'How?' And she said, I'll get a whipping.'" Ms. Berson testified that "the approach we use at Duke is that to make an adequate diagnosis of child sexual abuse, one of the more important parts of that diagnosis is the child's disclosure and the details and the information the child can tell you about the child sexual abuse." From her interviews with Jessica, Ms. Berson concluded that the girl had been "sexually abused . . . and that it should be reported to the Department of Social Services."

When asked by the military judge why she had questioned Jessica "as to who was involved" in the sexual abuse, Ms. Berson replied that

> one of the main focuses in terms of therapy that we seek, for knowing "who," is that again, you can't treat the child if the abuse is on-going. So, that if you don't know who it is and the person is continuing to sexually abuse the child, then your therapy is not going to be very productive because the child will see no benefit in talking about what happened because they're going to continue to be victimized. The issue again, is the child's safety, and that it stop.

When Ms. Berson had concluded her testimony, the military judge stated:

> Based on the presentation of Ms. Berson, I will sustain an objection under 803(4), if this is all that I am going to get.

He explained:

> [T]he issue under 803(4) is not the purposes of the individual taking the information. That is not the only issue. The other issue is the purposes of the person giving the information. As of right now, I have no information that would indicate that Jessica had any distress, was there in a hospital for the purposes of obtaining help. And based on that, 803 (4) will not apply. This then brings us to the alternative theories unless as I say, there is some other information; and that will take sometime. I've been through this before under the Residual Hearsay Rules.

In response, trial counsel indicated that she was still planning to proceed under Mil.R.Evid. 803(4) with respect to Jessica's statements to Ms. Berson and to another witness, Ms. Miller

Ms. Nancy Miller, a staff psychologist at the Wayne County Mental Health Center,[1] then testified for the Government.[2] As part of her duties, she "routinely interview[ed] . . . suspected victims of child sexual abuse"; and she had spoken with Jessica Dean on September 3, 4, and 8, 1987. When asked by trial counsel, "What questions did Jessica ask you that made it clear to you that she knew why she was there?" Ms. Berson responded:

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[1] Wayne County, North Carolina, is the county in which Seymour-Johnson Air Force Base is located.

[2] Previously, the defense had moved unsuccessfully to exclude any testimony by Ms. Miller because she was the wife of the Special Agent in charge of the Office of Special Investigations (OSI) Detachment at Seymour-Johnson Air Force Base, which had participated in investigating the charges against appellant.

> She asked me does this happen . . . a direct quote—she asked me if it happens to black children too. And I told her it did and I added that it happens to boys too. She was . . . she right away was upset that her parents may go to jail. She brought that out right away. And I said, "sometimes things like this happen." And she was afraid that she would go to a different home, so I was attempting to maybe alleviate some of these initial fears. She was just very anxious and fearful. I think she was concerned about consequences. She was real worried about her family.

According to Ms. Miller, during these interviews Jessica "was scared of things that had happened to her; that she was sad, mad." Ms. Miller testified that it was important to identify the abuser,

> because it will change treatment if it's inter-familial, or outside the family, it's a major change in treatment. . . . And my therapy is different because of the roles that are involved in a family dynamic versus a stranger in an alley.

After evaluating Jessica in September 1987, Ms. Miller had become her therapist. In that capacity she had attempted "to prepare the child for the emotional trauma" of testifying in court. This included role playing in "a mock courtroom setting." However, it had not been her "purpose" to prepare Jessica "to testify against her father in order that her father be sent to prison."

In connection with Ms. Miller's preparing Jessica for court, defense counsel questioned Ms. Miller about a juvenile court order entered in the Wayne County District Court whereunder Ms. Dean had been ordered not to discuss certain topics with the child. Ms. Miller responded that she had "had nothing to do with that court order" and that it had not been directed to her.

As part of her "therapy," she had explained to Ms. Dean "what happened to another mother" who had cov-

ered up for her husband. When she saw Jessica on September 3, she did not know who had set up the appointment which led to her interview with the child or whether the child and mother had been ordered to be there. However, when Ms. Miller "ended . . . [her] first interview with Jessica" on September 3 and talked with the child "about coming back the next day," she "wanted to come back—was eager."

In response to a question from the military judge as to why she "felt that the state order to the mother was probably a good idea," she replied:

> Because after the panic phase, . . . that this has been disclosed that it's come up, and society is involved with something, then there becomes a strong suppression phase, that they try to . . . family members try to suppress the child to be quiet because of the losses that can occur, and it's like . . . it could be verbal or it could be you know . . . covert . . . overt . . . any kind of suppression that's going on for the child to be quiet. The child's put in a real . . . it's a real bind there because she wants the abuse to stop and yet she feels she still has to protect her family.

On September 3, when she initially saw Jessica, Ms. Miller had

> said that some things may have happened that you feel sad or that—you know, I'm here to help you. I'm here . . . this is my job . . . my special job. I'm lucky. I get to work with special children like you. And that's when she had asked me if this happened to black children, and that kind of thing. And I said, "Yes, it does."

The witness then added that

> she went on to mention, I think about her weight, and that she was conscious about her weight and she had mentioned, I think why she went to Duke, the

> hospital and you know, I said, "well, you know I have that problem too." "And sometimes when we're unhappy, we may overeat." That came up.

On cross-examination, Ms. Miller conceded that she had assumed that Jessica "had special problems" because of "the nature of the case referred to" her.

When Ms. Miller had concluded her testimony, the military judge asked trial counsel and the defense if they wanted to offer any further evidence as to admissibility under Mil.R.Evid. 803(4) of statements made by Jessica to Ms. Berson and Ms. Miller. Their response was in the negative. Thereupon, the judge said that he needed to inquire about the order entered by the juvenile court. This prompted Dean's civilian defense counsel to complain that it was inappropriate for Ms. Miller to be preparing the child to testify while, at the same time, the mother was precluded by court order from even talking to her daughter about the case.

The judge had reviewed various documents that are in Dean's record of trial as appellate exhibits. Among these was a court order entered in the State District Court by consent on August 25, 1987, and entitled *In the matter of: Jessica Dean.* This order provided that, until a later hearing, Sergeant Dean "shall not be in the presence of the juvenile, Jessica Dean, unless there is another adult also with him and her"; and it required "the mother, Theresa Dean," to "secure the" child's "medical records . . . from Seymour-Johnson Air Force Base and . . . take them" to Dr. David Tayloe for use in examining the child. Also, Ms. Dean was required to "cooperate with the Wayne County Department of Social Services in setting up an appointment for Jessica Dean with Dr. Tayloe"; and the Department of Social Services was to "transmit a copy of the [Duke] medical records" to this physician.

A later consent order had been entered by the same court on November 23, 1987—this being the order to which civilian defense counsel apparently had been refer-

ring in his cross-examination of Ms. Miller. It provided "[t]hat Joseph L. Dean have absolutely no contact with Jessica Dean" and "[t]hat no one shall make statements to Jessica Dean that she, Jessica Dean, is responsible for any of the problems or problems currently facing the family." Also, it required "[t]hat Jessica . . . continue in therapy with the therapist at the Wayne County Mental Health Center who is presently treating her"; that Ms. Dean 'undergo therapy with the therapist of her choice"; and "when both the therapist for Theresa Dean and the therapist for Jessica Dean agree that joint therapy should be utilized: Theresa Dean and Jessica Dean shall undergo joint therapy." Moreover, if these "conditions were not met, the Department of Social Services" was authorized to "petition for a hearing on removal of the child."

When he had completed his review of the court orders, the military judge asked if the parties had submitted all the evidence they wished on the issue of admissibility under Mil.R.Evid. 803(4). The Government answered in the affirmative; but the civilian defense counsel decided to call Mrs. Dean as a witness.

She testified that she had not of her "own volition" initiated treatment of Jessica with the Wayne County Mental Health Center but that she had been sent there for an evaluation of Jessica by Dr. Jonathan Barnes. No one at Duke had discussed her taking Jessica to the Mental Health Center for treatment. When she went there with Jessica and talked with Ms. Miller, she 'was told that if I discussed court or anything to do with this that Jessica would be removed from my home and put in a Foster Home."

In recent weeks before trial, Ms. Miller had reiterated that Ms. Dean should not "discuss court with" Jessica. However, Ms. Miller had told her that she and Jessica "had practiced court." According to Ms. Dean, when she first went to Duke, it was because of Jessica's weight and not to have her examined for sexual abuse. Moreover, it

was not her "desire to take Jessica to" the Mental Health Center because of "some idea she may have been sexually abused." Ms. Miller had told Ms. Dean that she thought Ms. Dean was covering up for her husband; and she had given an example "about a mother who had went to jail for six months because she had seen it and not said anything."

On cross-examination, Mrs. Dean repeated her direct testimony that she had taken Jessica to the Mental Health Center for evaluation at the initiative of Mr. John Duke, who was the "juvenile attorney" for her and Jessica. She did not know why he had recommended this. When asked if she had talked "with Jessica explaining to her why she was going down to mental health, if this was to help her out, and that Mr. Duke wanted us to do this," Ms. Dean responded, "Yes, I've told her that Nancy Miller is here to help us." She had "encourage[d]" her "daughter to speak openly with Ms. Miller because she was there to help her"; and "I've always asked Jessica to tell the truth."

When she had taken Jessica to the Duke Medical Center, it was for her daughter's "obesity problem"; and she had not "anticipat[ed] that Jessica was going to be admitted into the hospital." This was not the first time that Jessica had been an inpatient in a hospital; and "once she found out that they were going to keep her there for a couple of days, . . . [s]he wasn't afraid." Mrs. Dean had told Jessica "to cooperate with the doctors during testing." She was "sure" that "Jessica understood that she was in a hospital"; but, as to whether "she understood that she was there to get some type of treatment," Mrs. Dean could not "give a yes or no answer." Jessica at first "was afraid of Nancy Berson. We had to coax her to go with her." Mrs. Dean told Jessica that "she had to" speak to Ms. Berson; "the lady was going to try and help her."

In response to questions by the military judge, Mrs. Dean testified that Jessica's weight problem had persisted

since she was 3; and Mrs. Dean mentioned various medical consultations about the problem. "I've had her to about five different doctors." As to the military judge's question whether Jessica "underst[oo]d that she had problems with her weight," Mrs. Dean responded, "I don't think she understands. She knows she's fatter than other kids and other kids make fun of her. I don't think . . . that she knows she's got a weight problem, but she knows she's bigger."

After Mrs. Dean's testimony, the judge heard argument as to whether Jessica's statements to Ms. Berson and Ms. Miller that she had been sexually abused by her father were admissible under Mil.R.Evid. 803(4). In deciding to receive the evidence, the judge stated:

> Under this particular hearsay exception, I'm looking to see if there are, in essence, two requirements met. First, is a subjective test, and that is whether the speaker of the information, in this case, Jessica Dean, perceives that the situation is one that will promote her well being and thus would have an incentive to be truthful. Thus, the key initial question is Jessica Dean's state of mind. She need not know the exact medical purposes for which the information is being requested, nor does she need to know with any medical precision that something is specially wrong. As to this first requirement, I find that in both interviews with Ms Berson and Ms Miller, that Jessica Dean's state of mind was that these sessions were set up to help her. Ms Dean had specifically advised her daughter of this and Jessica Dean was aware that she could use help for her weight and that she was sad and scared about what had happened to her. Now, the second, and more objective requirement is that the specific information offered must be to quote from the rule, "reasonably pertinent to the diagnosis or treatment." I find that this objective test also to have been met. The law specifically provides that

> information for the purposes of psychiatric treatment is included within this exception. Further, persons in the medical capacity, such as Ms Berson and Ms Miller, fit within the rule of persons covered by this rule. Not just doctors are included. Both Ms Berson and Ms Miller quite clearly and logically explained the importance of knowing for treatment purposes, the "what" and "who" of this circumstance. Information not only is reasonably pertinent, but actually required for effective treatment. The fact that both Ms Berson and Ms Miller may have had other concerns than medical treatment, does not, in this case, abrogate the finding of medical pertinence. Now, I would note that I am familiar with the nature of the testimony to be offered under this exception not only by that already received in testimony from the two witnesses, but also from the matters that are contained in Appellate Exhibit I, et cetera, that I was required to review prior to trial. Now on other issues mentioned by the defense, contrary to the argument to counsel, that rule 803(4) contemplates this testimony being used only after Jessica Dean testifies, the rule sets no such requirements. Unless you're trying to raise some other issue and I have misheard you.

Subsequently, the court-martial members were assembled and the trial began. The Government offered extensive medical evidence; and through Ms. Berson and Ms. Miller, it presented testimony about Jessica's statements concerning abuse by her father. Appellant, his wife, and two daughters who lived with them in their home all testified that Sergeant Dean was a loving father and had never abused Jessica. The defense offered numerous witnesses as to appellant's good character; and it called a medical expert to testify. Also, the defense offered a videotaped interview of Jessica, which had been conducted on May 18 by Mary Macri, a social worker at the Wayne County Department of Social Services. This was

apparently the only videotape that had been made of numerous interviews with Jessica and was offered to show that, by suggestive questions, interviewers had implanted in Jessica's mind that she had been sexually abused by her father.[3]

There was evidence in rebuttal and surrebuttal. Moreover, the court members were exceptionally attentive during the trial; and they not only asked questions of many witnesses but also requested that a doctor be called to testify who had treated Jessica several years before for injury in the vaginal area. At no time was Jessica called as a witness by either side—although she had testified at the Article 32, UCMJ, 10 USC § 832, pretrial hearing. The court members deliberated at great length before finally returning the findings of guilty.

II

Frequently, the child victim of alleged sexual abuse is uncooperative with prosecutors and recants earlier statements about being abused. Often there is concern that a child may be subjected to severe emotional trauma if called to testify in court—especially if the defendant is a close relative.

Consequently, prosecutors have searched for alternatives to having the child testify against the accused face-to-face in the courtroom. For example, many states allow use under certain circumstances of closed-circuit television for receipt of testimony by child witnesses in child-abuse cases. *See, e.g., Maryland v. Craig*, 497 U.S. ——, 110 S.Ct. 3157, 3168, 111 L.Ed.2d 666 (1990). In other instances, prosecutors will seek to introduce a child's extrajudicial statements—to a doctor, investigator, a teacher, a parent, a social worker, or some other person. *See,*

[3] At the Duke University Medical Center, the policy is not to videotape interviews with childen who may have been sexually abused. Apparently, this policy is based on concerns by the University Counsel about possible uses of such videotapes.

e.g., Idaho v. Wright, 497 U.S. ——, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990); *United States v. LeMere*, 22 MJ 61 (CMA 1986); *United States v. Deland*, 22 MJ 70 (CMA), *cert. denied*, 479 U.S. 856, 107 S.Ct. 196, 93 L.Ed.2d 128 (1986); *United States v. Arnold*, 25 MJ 129 (CMA 1987), *cert. denied*, 484 U.S. 1060, 108 S.Ct. 1015, 98 L.Ed.2d 980 (1988); *United States v. Martindale*, 30 MJ 172 (CMA 1990), *reconsideration granted* and record remanded, —— MJ —— (Daily Journal September 19, 1990). When such evidence is offered, the courts are confronted with hearsay objections and claims that a defendant's right to confrontation has been infringed.

In *Idaho v. Wright, supra*, the Supreme Court commented that the case before it did

> not raise the question whether, before a child's out-of-court statements are admitted, the Confrontation Clause requires the prosecution to show that a child witness is unavailable at trial—and, if so, what that showing requires. The trial court in this case found that respondent's younger daughter was incapable of communicating with the jury, and defense counsel agreed. The court below neither questioned this finding nor discussed the general requirement of unavailability. For purposes of deciding this case, we assume without deciding that, to the extent the unavailability requirement applies in this case, the younger daughter was an unavailable witness within the meaning of the Confrontation Clause.

110 S.Ct. at 3147 (citation omitted).

In the present case, the Government relied on Mil.R. Evid. 803(4) in its introduction of Jessica's statements to Ms. Berson and Ms. Miller. Mil.R.Evid. 803 does not require the prosecutor to establish the declarant's unavailability.

The defense at no point invoked the Confrontation Clause, and it did not specifically claim that the prosecu-

tion must establish unavailability to testify. If the defense had wished to make an issue of Jessica's availability, it had several opportunities—and at least one invitation—to do so.[4]

Indeed, it seems quite likely that Jessica could have been called to testify. She had testified at the Article 32 pretrial hearing;[5] and there is no reason to believe that she had left the area. Apparently, both the prosecution and the defense decided that the child's testimony in court would not help their respective causes. The prosecution presumably concluded that her pretrial statements Ms. Berson and Ms. Miller were at least as effective as her in-court testimony would be. The defense probably was concerned about what Jessica might say if cross-examined about her pretrial statements.

At one point during presentation of the defense case, the military judge reminded counsel that they had not yet resolved a question raised earlier as to Jessica's competence to testify. Thereupon, the civilian defense counsel replied, "[A]t this time, after . . . I guess this is on the record. We have decided at this time not to call Jessica."[6]

Under these circumstances, we need only consider whether Jessica's statements to Ms. Berson and Ms. Miller met the requirements of Mil.R.Evid. 803(4) without reference to appellant's right of confrontation.

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[4] As we interpret the previously quoted judge's comment in ruling that Mil.R.Evid. 803(4) did not require Jessica to testify before her statement was admitted, he was making clear that he did not believe that the defense had attempted to raise any issue concerning availability of this witness.

[5] Neither side attempted to introduce the testimony that Jessica had given at the Article 32 hearing.

[6] The court members, who did request the presence of one witness not called by the parties, presumably concluded that, if neither the Government nor the defense had called Jessica, it was not worth their while—or the trauma to Jessica—to have her testify.

Clearly, the military judge was well aware of the requirements of that rule. Thus, the only issue is whether the evidence supported his rulings.

The statements to Ms. Berson are the easier to deal with. Even though Jessica had not come to the Duke University Medical Center to be examined for sexual abuse, this examination was certainly for a valid medical purpose; and the interview by Ms. Berson—conducted as a part of a team effort—is within the scope of Mil.R. Evid. 803(4). Furthermore, for reasons explained by Ms. Berson, it was important for her to ascertain not only whether sexual abuse had occurred but also who the perpetrator was.[7]

The issue, as the military judge perceived from the outset, was whether Jessica believed that she was receiving treatment that would help her, so that it was important for her to give truthful information to Ms. Berson. Jessica had a weight problem for which she had been examined by several doctors and for which she had been brought to Duke by her mother; she had been in hospitals numerous times before as an inpatient; and she had been admitted at Duke as an inpatient. Under these circumstances, we believe the military judge could reasonably decide that Jessica expected to benefit from giving truthful answers to Ms. Berson.

Jessica's statements to Ms. Miller also can be considered for purposes of medical diagnosis and treatment. However, in this instance, it is less clear that the girl perceived a prospective benefit from being truthful in her answers.

The interviews with Ms. Miller were not in a hospital context. According to Ms. Miller's testimony, Jessica had

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[7] Ms. Miller's testimony is to the same effect with respect to her inquiry about the identity of the abuser. For similar testimony in another case, *see United States v. Deland*, 22 MJ 70, 74 (CMA), *cert. denied*, 479 U.S. 856, 107 S.Ct. 196, 93 L.Ed.2d 128 (1986).

been originally seen on September 4, 1987, by Dr. Jonathan Barnes, to whom she had been referred for a mental health evaluation. He had been unable to establish a rapport with Jessica and had asked Ms. Miller to assist him in interviewing the child. We note, however, that Ms. Dean testified that she had told Jessica that Ms. Miller was "here to help us" and that she should "speak openly with" her. Taking this into account and the events that had preceded, we conclude that the statements to Ms. Miller are included—although narrowly—within the rationale of Mil.R.Evid. 803(4).

We also are of the view that—even though it was a close, hotly contested case—any error in admitting the testimony of Ms. Miller was not prejudicial. The defense had already introduced into evidence the videotape of Ms. Macri's interview of Jessica on May 18, 1987. In light of that interview and others, we believe the court members would have inferred that by September Jessica already had been interviewed so often—occasionally in a rather suggestive manner—that whatever she told Ms. Miller at the time should be given little weight. On the other hand, the statements that she had made to Ms. Berson on May 13—when for the first time she was interviewed about suspected sexual abuse—would have been given great weight by the members.

In conclusion, we must acknowledge once again that cases like this give us great concern. As Justice Scalia pointed out in his dissent in *Craig*, there are studies which "show that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality." *Id.* Therefore, both trial and apellate courts must be vigilant in assuring that the rights of the accused are preserved.

Here, the military judge displayed that vigilance. Moreover, there is extensive medical testimony to establish appellant's guilt—although the defense offered ex-

pert testimony to show that Jessica's medical abnormalities in the genital and anal areas were consistent with causes other than sexual abuse. Our ultimate conclusion —"the bottom line"—is that Dean received a fair, well-conducted trial and that no prejudicial error tainted his conviction.

III

The decision of the United States Air Force Court of Military Review is affirmed.

Judges COX and SULLIVAN concur.

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